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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1573

SEYMOUR BERGEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Seymour Bergen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 21, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 21, 1979. A timely petition for rehearing en banc was denied on February 13, 1980. By order of the Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States, dated March 3, 1980, petitioner was granted an extension of time within which to file a petition for writ of certiorari up to and including April 11, 1980. This petition is filed prior to April 11, 1980. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code § 1254(1).

QUESTIONS PRESENTED

1. WHETHER ESSENTIALLY BOILERPLATE CONCLUSIONARY AVERMENTS APPLICABLE TO ANY GAMBLING INVESTIGATION MEET THE "FULL AND COMPLETE STATEMENT" REQUIREMENT OF TITLE 18, UNITED STATES CODE, § 2518(1)(c), OR THE "PARTICULARITY" REQUIREMENTS OF THE FOURTH AMENDMENT, SUFFICIENT TO AUTHORIZE THE INTERCEPTION OF TELEPHONE COMMUNICATIONS.

2. WHETHER A SUBSTANTIAL NONFRIVOLOUS OFFER OF PROOF THAT AN AFFIDAVIT FILED IN SUPPORT OF AN ORDER AUTHORIZING THE INTERCEPTION OF TELEPHONE COMMUNICATIONS CONTAINS MATERIAL FALSE MISREPRESENTATIONS WITH RESPECT TO THE WILLINGNESS OF AN INFORMANT TO TESTIFY IN THE CONTEXT OF TITLE 18, UNITED STATES CODE § 2518(1)(c) REQUIRES THE HOLDING OF AN EVIDENTIARY HEARING AND THE GRANTING OF A MOTION TO SUPPRESS.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code § 2515, provides, in pertinent part, that:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in

> or before any court . . . if the disclosure of that information would be in violation of this chapter."

Title 18, United States Code § 2518, at all times pertinent to these proceedings, provided, in pertinent part, that:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> * * *
>
> "(c) a full and complete statement as to whether or not investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> * * *

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that ---

* * *

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;"

STATEMENT OF THE CASE

By a two count indictment of the Grand Jury dated November 22, 1977, petitioner, Seymour Bergen, was charged in Count I, together with codefendants Kail, Freeman and Callahan, with conducting a gambling business in violation of Title 18, United States Code § 1955. Count II

charged petitioner Bergen alone with interstate transmission of wagering information in violation of Title 18, United States Code §§ 1084 and 2.

Petitioner entered a plea of not guilty and moved the District Court to suppress all of the telephone communications intercepted by the Government pursuant to wiretap authorizations obtained under Title 18, United States Code §§ 2510-2520. The grounds for suppression, as contended by petitioner, asserted, in pertinent part, that the Government affidavit in support of the order authorizing interception of said telephone conversations (1) was conclusionary in nature and failed to comply with the "full and complete statement" requirements of Title 18, United States Code § 2518; and (2) contained materially false statements warranting, preliminarily, an evidentiary hearing, and ultimately, suppression of the telephone communications intercepted.

The District Court denied the motions without an evidentiary hearing, whereupon the question of the guilt or innocence of the petitioner was submitted to the

District Court without a jury upon stipulated facts. Petitioner was found guilty as charged. On Count I petitioner was sentenced to the custody of the Attorney General for imprisonment for a term of thirty (30) months and was fined $10,000.00. On Count II petitioner was sentenced to the custody of the Attorney General for a term of two (2) years and was fined $10,000.00. The terms of imprisonment were to run concurrently. Petitioner is presently at liberty upon bond pending appeal in the amount of $15,000.00.

STATEMENT OF THE FACTS

From July 29, 1975 through August 7, 1975, the Government intercepted telephone conversations pursuant to the July 29, 1975 order of the District Court authorizing the same. Said order was issued on the basis of the July 29, 1975 application of the Government supported by the affidavit of FBI agent Darrell Shaver. The interceptions and the evidentiary fruits thereof formed the bulk of the evidence

against petitioner and the matters set forth in the stipulation of facts upon which the question of guilt or innocence was submitted to the District Court. Petitioner's motion to suppress concerned the interceptions and their evidentiary fruits.

The affidavit of Shaver set forth information received from seven informants as to various aspects of the Government investigation. In paragraph 45 of the affidavit, the lead paragraph of that portion of the affidavit explaining the "need for interception," the affiant averred that "Confidential informants referred to herein have stated even if immunized and given protective custody they would be unwilling to testify at any proceedings for fear of their safety." At the proceedings in the District Court on the motion of petitioner to suppress evidence it was stipulated as the defense offer of proof that one Gary Hallman was one of the informants designated in the Shaver affidavit and that Hallman would testify as follows:

"[T]hat he had given information to agents of the Federal Bureau of Investigation on a number of occasions over a number of years; that he discussed with agents of the FBI Mr. Seymour Bergen and Mr. Seymour Bergen's gambling activities; that he never was asked by agents of the FBI whether he would refuse to testify, whether he wanted to testify; that he was never told that he would be granted immunity; that he never told agents that he would refuse to testify even if granted immunity; that had he been told or asked to testify he would have been reluctant to, would have preferred not to testify, but had he been told that his testimony was required I believe he would have testified.

"More particularly, had he been granted immunity, he would have testified rather than go to jail".

The remainder of the Shaver affidavit bearing upon the "need for interception" contained the following recitals:

"46. Physical surveillances have been conducted on numerous occasions on Seymour Bergen and the individuals named in this affidavit. The addresses of 22848 Sparrow Dell Drive, Calabasas, California, and 20742 Clarendon Street, Los Angeles, California, have been surveilled, but they have been generally unsuccessful in fully establishing the elements of the subject violations and identities of all conspirators. Contacts have been noted between principals of the operation, however, such surveillance has not been conclusive.

"47. Investigation involving Seymour Bergen and his associates previously mentioned has been conducted by the Los Angeles Office of the Federal Bureau of Investigation since April 1973. During this time normal investigative techniques have been employed and have failed to provide adequate proof of all the elements of a

violation of Title 18, United States Code, § 1955 (Operating an Illegal Gambling Business).

"48. This investigation has revealed that during the past two years Seymour Bergen's bookmaking operation has continually changed, both as to the manner of operation and as to the people involved. The principals in the operation have varied according to the time. Former employees of the operation have been interviewed, however, they can provide only that information which they were familiar with at the time of their employment. Also, on several occasions those people interviewed have told Seymour Bergen of the Federal Bureau of Investigation's inquiry regarding his illegal gambling activities, at which time he drastically altered his operation by changing personnel, telephone numbers, and "pay and collect" methods.

"49. The telephone numbers in the operation are changed frequently; the methods used to "settle up" or "pay and collect" are changed, utilizing at various times either personal contacts with bettors or mailing of monies or checks in order to "settle up". Many bettors have been interviewed, however, their knowledge extends only to the telephone number and individual being called, and they have no knowledge of the overall operation.

"50. Additionally, Affiant and other Special Agents of the Federal Bureau of Investigation have given thorough consideration to infiltration of this group; however, based upon my experience and the experiences of other Special Agents knowledgeable in investigating bookmaking, this procedure does not appear likely to succeed. Bookmakers operate in such a manner as to secrete themselves from police detection

and are extremely cautious in involving new people in their operation, either as employees or as bettors. In addition, if an Agent were successful in infiltrating the organization, he would only learn the identities of one or two people with whom he dealt and would not know the other parties involved or the complete nature of the operation nor would he be able to obtain sufficient proof as to all elements of a violation of Title 18, United States Code § 1955.

"51. Telephone toll records have been obtained periodically on the telephone numbers used at various times by Seymour Bergen and his associates, and they reveal numerous calls between the principals in the bookmaking operation, but they do not reveal the nature of the contacts between the conspirators or the exact functions they serve in the Seymour Bergen bookmaking operation.

"52. I have found that through my experience and the experience of other Special Agents who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers immediately prior to or during a physical search sometimes destroy the records. Accordingly, records that have been seized in past gambling cases have generally not been sufficient to establish the elements of a Federal offense because such records are difficult to interpret and many times are of little or no significance without further knowledge of the gambler's activities. Therefore, utilization of the information furnished by Sources One through Seven in paragraphs 5 through 44 above to obtain search warrants for the premises of the conspirators in this case would be unlikely to result in sufficient

evidence to prove the elements of violation of Title 18, United States Code § 1955.

"55. Most of the individuals who have been identified in this conspiracy are known to me and to other Special Agents of the Federal Bureau of Investigation to be longtime participants in criminal activities and would be likely to lie under oath unless confronted with the facts which would force them to tell the truth. At this time such facts are not available to the Government, therefore, Grand Jury investigation with grants of immunity appear reasonably unlikely to succeed.

"54. For the reasons set forth in preceding paragraphs 45 through 53, normal methods of investigation have been attempted and have failed or reasonably appear unlikely to succeed and the only reasonable method of developing

the necessary evidence of violations is to intercept wire communications to and from telephone numbers 213-888-1737, 213-888-6065, 213-346-0117, 213-346-5537, 714-325-0196, and 714-325-5271, which will reveal the details of the operation of the illegal gambling business described above."

REASONS FOR GRANTING THE WRIT

I

THE CASE AT BENCH IS IN DIRECT CONFLICT WITH PREVIOUS DECISIONS OF THE NINTH CIRCUIT, CONTRAVENES THE CLEAR CONGRESSIONAL INTENT UNDERLYING THE WIRETAP STATUTE, AND CONSTITUTES AN UNWARRANTED DILUTION OF THE "FULL AND COMPLETE STATEMENT" REQUIREMENTS OF TITLE 18, UNITED STATES CODE, § 2518(1)(c).

Title 18, United States Code, § 2518 (1)(c), requires that each application for an order authorizing the interception of wire or oral communications include:

"A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;"

Violation of this requirement will result in suppression not based on the judicially fashioned exclusionary rule, but rather upon the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. United States v. Giordano, 416 U.S. 525, 515 (1974).

This provision was included so as to guarantee that a necessity does in fact exist where a wiretap order is requested. Wiretaps are "not to be routinely employed as the initial step in a criminal investigation." United States v. Giordano, supra, at 515. The requirement assures that wiretapping is not resorted to in situations where traditional investigative techniques should suffice to expose the crime. United States v. Kahn, 415 U.S. 143 (1974).

In light of these considerations, the admonition of the Court of Appeals for the Ninth Circuit in United States v. Kalustian, 529 F.2d 585 (9th Cir. 1976), takes on major significance: Federal courts must review wiretap orders to "insure that the issuing magistrate properly performed his function and did not 'serve merely as a rubber stamp for the police'." United States v. Kalustian, supra, quoting from United States v. Ventresca, 380 U.S. 102, 109 (1965).

The Ninth Circuit in Kalustian, supra, reviewed an affidavit in support of a wiretap application similar to that in the case at bench, and, after defining the standards of § 2518(c), concluded the affidavit to be defective.

Defendants in Kalustian, as in the instant case, were charged with violating 18 U.S.C. § 1955. The court first set out the pertinent parts of the affidavit and then discussed the general congressional intent behind § 2518(1), as follows:

"Title III was written to create limited authority for electronic

surveillance in the investigation of specific crimes thought to lie within the providence of organized crime. It was designated to conform to prevailing constitutional standards (citations omitted). The restraint with which such authority was granted reflects the legitimate fears with which a free society entertains the use of electronic surveillance."

Turning to the affidavit in question, the Ninth Circuit in Kalustian stated:

"The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect, the government's position is that all gambling cases are tough to crack, so the government need only show that probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support this view."

In United States v. Kerrigan, 514 F.2d 35 (9th Cir. 1975), the Ninth Circuit warned against the use of "boilerplate recitations" in wiretap applications"

"We agree with appellants that boilerplate recitations of the difficulty of gathering usable evidence in bookmaking prosecutions is not sufficient basis for granting a wiretap order. To hold otherwise would be to make § 2518(1)(c) and 3(c) mere formalities in bookmaking cases."

More recently in United States v. Spagnuolo, 549 F.2d 705 (9th Cir. 1977), the Ninth Circuit clarified the type of showing required to sustain a wiretap application under the statute:

". . . The affidavit must reveal that . . . in the particular investigation normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time.

"Where such techniques have not

been so employed the sufficiency of the affidavit depends on whether there is a showing that under the particular circumstances of the case the employment of such techniques appear 'unlikely to succeed if tried or to be too dangerous." Any such showing requires setting forth an adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable the district judge to determine <u>independently of an agent's assertions with respect to his or other agents' experiences</u>, that ordinary investigative techniques very likely will not succeed or that their use will imperil life or in some other specific way be too dangerous. (Emphasis added)."

An application composed solely or largely of conclusions unsupported by particular facts gives no basis to a district judge to make the determinations necessary under the statute. Until the instant case, the Ninth Circuit had charted a clear and

consistent path in its interpretation of the wiretap statute. In the case at bench, however, the Ninth Circuit has directly and inexplicably contradicted its holding in <u>Kalustian</u>, <u>supra</u>, and created a conflict within the Ninth Circuit as well as the other Circuit Courts which have had occasion to interpret the statute. An examination of the instant wiretap applicaton reveals that it fails to comply with the requirements of the wiretap statute, yet the Ninth Circuit has ignored its own holding in <u>Kalustian</u>, <u>supra</u>, in affirming the conviction below.

The affidavit here reveals that police informants had completely infiltrated the gambling operation run by defendant Bergen. These informants knew many of the persons involved with the operation of the business, bet directly with the front office of the operation and Bergen personally, and also had personal conversations with Bergen in which Bergen confided that he was running the gambling operation and in which Bergen disclosed much about the operation and personnel involved therein.

These informants knew the telephone numbers employed by Bergen, many of the front office personnel, which personnel were to be replaced, and the name of codefendant Kail, as well as his function as a back office clerk, and the telephone numbers.

These informants, seven in all, provided extensive information to the FBI about the structure, personnel, and extent of the gambling business. Corroboration of much of the information was obtained by surveillance of Kail and Bergen, administrative telephone subpoenas for codefendant Callahan's toll records, and similar investigative procedures.

Despite the extensive infiltration of the gambling operation, the affidavit concluded that normal investigative techniques would not be successful because (1) informants were unwilling to testify because of fear for their safety, (2) surveillance had been generally 'unsuccessful', (3) normal investigative techniques had failed to provide proof

of all the elements of the offense, (4) and that the government had difficulty in establishing its case.

The basis for these conclusions is wholly absent from the affidavit. As in Kalustian, supra, the affidavit is couched in conclusory jargon which, like the "boilerplate" allegations condemned in Kerrigan, supra, fails to provide facts to support the allegations.

The affidavit fails to set forth what 'normal investigative techniques' were employed or considered, the number of agents involved in the investigation, the number of customers questioned or offered immunity, or the length of the investigation.

To support its conclusion, the FBI affiant relied on the same shopworn "boilerplate" recitation rejected by the Ninth Circuit in Kerrigan, Kalustian and Spagnuolo, supra. The only reasons given to support the allegation that infiltration will be unsuccessful is that it was given "thorough consideration". The only "facts" to support the conclusion is a

recitation of the experience of other special agents knowledgeable in bookmaking matters who concluded that the procedure does not appear likely to succeed.

Reference to the general secretive nature of bookmakers and the difficulty of learning of more than one or two persons in an organization was relied upon to excuse implementing each and every possible normal investigative technique. These general conclusions about a gambling organization are particularly inappropriate in the instant case where extensive infiltration had already occurred and where many of the members of the organization, and their respective functions, were already known to the FBI.

Most disturbing is the allegation that informants were unwilling to testify for fear of reprisal. Not only is there nothing but the bald allegation of the affiant to support the claim, but the stipulation concerning informant Gary Hallman reveals the claim to be fraudulent and false. Had the issuing judge been aware that at least one of the seven

informants had never even been asked to testify, his determination on the sufficiency of the affidavit may have been quite different.

Significantly, the Ninth Circuit in Kalustian, supra, at 592, stated that "the refusal of the informants to testify is a matter for the court to consider in authorizing electronic surveillance. However, standing alone it is not sufficient." (Emphasis added).

The claim is further suspect where one considers that there is no allegation that any one in the Bergen organization is claimed to have either threatened or actually employed force to collect a gambling debt.

The claim of frightened informants, like the allegation of the unavailability of conventional methods, is wholly self-serving and devoid of factual basis.

Taken as a whole, the affidavit here lacks any good faith showing on the part of the government that in this particular investigation normal investigative techniques had failed or were likely to fail within a reasonable period of time.

For the foregoing reasons, the Court below was in error in finding compliance with the requirements of Title 18, United States Code §§ 2518(1)(c) and 3(c).

II

THE CASE AT BENCH IS IN CONFLICT IN PRINCIPLE WITH THE STANDARDS ESTABLISHED BY THIS HONORABLE COURT IN FRANKS v. DELAWARE

In Franks v. Delaware (1978) __U.S.__, __, 98 S.Ct. 2674, 2676-2677, this Honorable Court established that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one

side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." The case at bench cannot be reconciled with the decision in Franks.

The stipulation with respect to the proffered testimony of Gary Hallman, one of the seven informants designated in the wiretap authorization was:

"[T]hat he had given information to agents of the Federal Bureau of Investigation on a number of occasions over a number of years; that he discussed with agents of the FBI Mr. Seymour Bergen and Mr. Seymour Bergen's gambling activities; that he never was asked by agents of the FBI whether he would refuse to testify, whether he wanted to testify; that he was never told that he would be granted immunity or could be granted immunity; that he never told agents that he would refuse

to testify even if granted immunity; that had he been told or asked to testify he would have been reluctant to, would have preferred not to testify, but had he been told that his testimony was required I believe he would have testified.

"More particularly, had he been granted immunity, he would have testified rather than go to jail."

In paragraph 45 of the affidavit, the lead paragraph of that portion of the affidavit explaining the "need for interception", however, the affiant averred that "Confidential informants referred to herein have stated even if immunized and given protective custody they would be unwilling to testify at any proceedings for fear of their safety."

This court, in Franks v. Delaware, 98 S.Ct. 2674 (1978), established that in limited circumstances a defendant may challenge the truthfulness of factual statements made in affidavits supporting a search warrant. Franks, supra, held that the defendant must make a substantial

preliminary showing supported by affidavits or otherwise reliable statements of witnesses that an affiant's declaration is untruthful. The misstatements must be deliberately false or made with reckless disregard for the truth. Additionally, they must be material to the finding of probable cause.

The omission, or misstatement, concerning the position of informant Hallman is highly material, contrary to the position taken by the Court of Appeals in the case at bench. At page 4, lines 7-11, the Court below stated:

> The fact that Hallman was admittedly unwilling to testify demonstrates that any misrepresentation in the affidavit was not material. Furthermore there were seven confidential informants mentioned by Shaver in the affidavit. (slip opinion).

Despite the statement by the Circuit Court here that Hallman was unwilling to testify, the stipulation as to Hallman's testimony reveals that he was reluctant

to testify but although he would prefer not to testify, he would have done so if told that his testimony was required.

There is a substantial difference between reluctance to testify and unwillingness to testify; the difference is not merely a matter of form. Simply put, Hallman was willing to testify, albeit reluctantly.

The omission of that information was both material and sufficient to invalidate the application if found to be deliberate.

Admittedly, it is not possible to determine without an evidentiary hearing whether the misstatement was negligently or intentionally included. It seems certain, however, that if the issuing judge had known at least one informant was willing to testify, contrary to the allegations of Shaver, he may have decided either to interview the informants in camera, call for additional testimony, or declined to issue the authorization.

Only the holding of an evidentiary hearing on the question of the availability of the informants and their willingness to testify could conclusively determine whether the Hallman omission was intentional or inadvertent. As counsel for Bergen requested a hearing on that issue both before the district trial judge and the Court of Appeals panel, a remand to the trial court for such a hearing seems appropriate. The statement in the wire interception application that all the informants have refused to testify even if granted immunity and protective custody was clearly false; whether it was deliberately false should be further explored to determine whether a violation under Franks, supra, has been made out.1/

1/ With appropriate paraphrasing, the recitations above with respect to the reasons for granting the writ are excerpted from the Petition for Writ of Certiorari filed on behalf of codefendant Edwin Kail.

CONCLUSION

For all of the reasons set forth above, a writ of certiorari should issue to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD G. SHERMAN

Counsel for Petitioner

APPENDIX

F I L E D

NOV 12 1979

RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee vs. EDWARD KAIL, Defendant-Appellant	78-1633
UNITED STATES OF AMERICA, Plaintiff-Appellee vs. SEYMOUR BERGEN, Defendant-Appellant	78-1643
UNITED STATES OF AMERICA, vs. RUSSELL CALLAHAN, Defendant-Appellant	78-1772
UNITED STATES OF AMERICA, Plaintiff-Appellee vs. CLARENCE ELDEN FREEMAN, Defendant-Appellant	78-1677 OPINION

Appeal from the United States District Court for the Central District of California

Before: WALLACE and TANG, Circuit Judges, and BATTIN,* District Judge

TANG, Circuit Judge.

The defendants, Edwin Kail, Seymour Bergen, Russell Callahan, and Clarence Freeman, together with two persons unnamed as defendants, were indicted on one count of conducting a gambling business, in violation of 18 U.S.C. §1955. Bergen was also indicted on a second count, interstate transmission of wagering information, in violation of 18 U.S.C. §§1084 and 2. After they unsuccessfully moved to suppress evidence obtained by wiretaps, the defendants consented to be tried on a stipulation of facts and were found guilty on all counts. They now appeal, raising numerous issues but primarily emphasizing the legality of the wiretap. We affirm the convictions.

---

* Honorable James F. Battin, United States District Judge for the District of Montana, sitting by designation.

I

On July 29, 1975, the Government received authorization to intercept wire communications from six telephone numbers that were subscribed to by three of the defendants. The indictment was not returned against the defendants until November 1977. Consequently, Bergen and Kail first contend that the indictment should have been dismissed because of preindictment delay.

Preindictment delay does not implicate the speedy trial guarantee of the sixth amendment, although in some instances it might violate the due process clause of the fifth amendment. United States v. Marion, 404 U.S. 307 (1971); United States v. Lovasco, 431 U.S. 783 (1977). The due process test for impermissible preindictment delay requires a delicate balancing of the circumstances of each case. Arnold v. McCarthy, 566 F.2d 1377, 1383 (9th Cir. 1978). Primarily, the court must compare the gravity of the actual prejudice to the reasons for the delay. Id.; see Lovasco, 431 U.S. at 79.

Bergen and Kail conclusively alleged that they have been prejudiced by the loss of memory due to time and by the loss of possible witnesses to their activities. They do not, however, specify what might have forgotten or who are the possible witnesses that they were unable to secure. Nor do they allege that the Government delayed bringing the indictment to obtain a tactical advantage. In these circumstances, their due process claim is unsubstantial. Arnold, 566 F.2d at 1383-85.

II

Pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-20, government agents obtained an order authorizing the interceptions of telephone communications by the defendants. The defendants raise a variety of reasons why the wiretap order was illegal. None are meritorious.

A. The Constitutionality of 18 U.S.C. §2518

The defendants argue that the procedure specified in §2518 for obtaining a wiretap is unconstitutional. This argument has previously been rejected by the court. United States v. Turner, 528 F.2d 143 (9th Cir. 1975), cert. denied, 429 U.S. 837 (1976).

B. Alleged Misrepresentations in the Affidavit

The Government's application for a wiretap was supported by the lengthy affidavit of FBI agent Darrell Shaver. In paragraph 45 of the affidavit, Shaver averred that confidential informants stated that even if they were immunized and given protective custody they would be unwilling to testify at any proceedings for fear of their safety. In the district court, Bergen offered to prove that an informant, Gary Hallman, had never been asked to testify, but if asked, would have testified, although reluctantly. The defendants thus contend that the offer of proof exhibited a material

misrepresentation in the Shaver affidavit, warranting invalidation of the wiretap order.

Assuming that Hallman was one of the confidential informants referred to in the affidavit, the defendants have not persuaded us that there were material misrepresentations in Shaver's affidavit. The fact that Hallman was admittedly unwilling to testify demonstrates that any misrepresentation in the affidavit was not material. Furthermore, there were seven confidential informants mentioned by Shaver in the affidavit.

C. The Requirements of §2518(1)(c)

To show the necessity for a wiretap, the application must include a full and complete statement as to whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or too dangerous. 18 U.S.C. §2518(1)(c). See, e.g., United States v. Martinez, 588 F.2d 1227, 1231 (9th Cir. 1978). The defendants contend that the Shaver affidavit lacked sufficient particularity to meet

this requirement of necessity.[1/]

Viewing, as we must, the affidavit as a whole, id., we find that the Shaver affidavit did not consist of bald, conclusory statements, but instead provided sufficient particularized detail to demonstrate the need for a wiretap in the discrete circumstances of this case. The lengthy Shaver affidavit describes in considerable detail the history of the three-month investigation of the bookmaking operation prior to the application for the wiretap. Besides the personal observations of the government agents, the affidavit discloses the substance of information obtained from seven confidential sources, each of whose reliability is documented. Each source had some contact with either Bergen, Callahan, or Kail involving gambling in some way.

1/ Despite the defendants' lengthy arguments concerning our prior discussions of §2518(1)(c), we decline to retrace the lines drawn in the numerous decisions of the court. See United States v. Baker, 589 F.2d 1089, 1091 (9th Cir. 1979).

The sources revealed that Bergen operated a large bookmaking business. They described Kail as the "back office" clerk of Bergen's Los Angeles operation, and Callahan as Bergen's Palm Springs agent who "settles-up" when he is in Los Angeles. Through both their sources and personal observations, the government agents were able to learn names, dates, and locations of the gambling operations.

Despite the success of the investigation using normal investigative techniques, the affidavit pointed out the deficiences and limitations of the investigation. No one interviewed knew more than two participants in the operation. Additionally, Bergen changed the manner of operations, such as telephone numbers and methods of payment and collection, because he learned of the FBI surveillance from persons interviewed by the FBI. As a result, the information obtained from those interviewed became stale, and the possibility that Bergen would avoid detection increased. The agents also undertook physical surveillance of the persons named in the application and noted some contacts

among the principals, but surveillance was generally unsuccessful in fully establishing the elements of the offense. The affidavit further described the reluctance of informants to testify, the futility of infiltration, and the limitations of employing telephone toll records in uncovering the nature of Bergen's operation. In short, the affidavit enabled the court to ascertain that the application was not intended to be used as a first step in the agents had encountered when using normal investigative techniques. See United States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977).

Although the affidavit was not as detailed with respect to Callahan when compared with its description of Bergen and Kail, the affidavit read as a whole established the futility of using normal investigative procedures for all of the principals. "A particularized showing . . . may be established . . . not only by a minutia of detail discretely directed, but by persuasive facts pertaining in common to all of the principals and their telephones." United States v.

Baker, 589 F.2d 1008, 1012 (9th Cir. 1979). Such was the case here.

D. Prior Conversations

Callahan contends that the failure to set forth previous interceptions of his conversations violated §2518(1)(e). Section 2518(1)(e) requires that the application set forth a statement concerning all previous applications, not interceptions, known to the person making the present application. By disclosing in paragraph 55 of the affidavit that he was aware that there had been previous applications for wiretaps of Callahan's phones, Shaver complied with §2518(1)(e). As Callahan concedes, Shaver did not have to disclose all previous interceptions of Callahan's conversations. See United States v. Florea, 541 F.2d 568, (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977).

III

After obtaining the wiretap order, government agents installed a pen register to learn the telephone numbers that were dialed on the monitored telephones. They

did not obtain authorization to use this device. The defendants contend that a separate order was necessary to allow the government to use the pen register in conjunction with the wiretap.

Because pen registers do not intercept the contents of communications, they are not within the scope of Title III, United States v. New York Tel. Co., 434 U.S. 159 (1977), and therefore, to install a pen register, the Government need not show compliance with Title III requirements. See United States v. Falcone, 505 F.2d 478, 482 (3rd Cir. 1974) cert. denied, 420 U.S. 955 (1975).

This does not mean that no authorization for the use of pen registers is required. However, once a valid wiretap order has been issued, as here, there need not be separate authorization for the pen register. Id. It is already possible to decipher the telephone numbers of outgoing calls by the use of a wiretap and tape recorder. The pen register, by automatically translating electrical impulses into the numbers dialed, avoids the need to interpret

what has been recorded from the wiretap. This mechanical refinement provided by the pen register is thus comprehended within the terms of the wiretap order, making separate authorization unnecessary. Id. If, as defendants argue, the Government must support the use of the pen register by a showing of probable cause that showing is met by satisfying the probable cause requirements for obtaining the wiretap, see New York Telephone Company, 434 U.S. at 168-69.

IV

In support of his motion to suppress the information obtained by the wiretaps, Callahan argued that statements contained in the Shaver affidavit were derived from wiretaps, subsequently found illegal, that were made in connection with the Vicki Balos case. In response, Shaver filed an affidavit stating that none of the statements pertaining to Callahan were derived from the Balos wiretaps. After a post-trial Alderman (Alderman v. United States, 394 U.S. 165 (1969)) hearing, the district court found that the

Government had sustained its burden of showing that the affidavit was not derived from illegal wiretap.

The district court's finding was not clearly erroneous. Shaver explicitly denied that his information was derived from the illegal wiretap. Other than asserting the existence of the Balos wiretap, Callahan provided no evidence to demonstrate that the Shaver affidavit was tainted. The district court reasonably relied on Shaver's affidavit disclaiming that his information was tainted.

V

In connection with his request for an Alderman hearing, Callahan moved on the day before trial for discovery of various items, including access to the affidavit requesting the Balos wiretap and recordings of Balos interceptions; the Government's files in the Balos prosecution; names and address of all persons monitored in the Balos wiretap or with knowledge of the wiretap; and access to the Government's file in his case. The court held an Alderman hearing and allowed

discovery of the Balos affidavit and transcripts of some of the interceptions. Callahan nevertheless contends that the district court unreasonably restricted his access to discovery.

Even if a defendant makes a preliminary showing of taint, he is not entitled to unlimited access to Government files; the extent of discovery is left to discretion of the district court. Alderman, 394 U.S. at 185. There was no abuse of discretion in this case.

In November the district court issued an order that a hearing would be held if there were contested discovery matters. The parties stipulated that no hearing was necessary because there were no contested discovery matters. Callahan did not make his request for discovery until January 20, 1978, one working day before trial. Like the district court, we find it inconceivable that the defendant was not aware of the Balos action much earlier. Despite the untimeliness of Callahan's request, the district court allowed limited discovery. Particularly in view of the fact that Callahan provided

no specific evidence of taint, we find that the district court's handling of Callahan's discovery request to be reasonable.

VI

The defendants, without citation of authority, contend that 18 U.S.C. §1955 is unconstitutional because it overreaches Congress' powers under the Commerce Clause. This precise contention was rejected in United States v. Sacco, 491 F.2d 995 (9th Cir. 1974) (en banc).

VI

Finally, Feldman contends that the evidence was insufficient to prove that he committed a violation of §1955.

The two stipulations, supplemented by the Government's exhibits of the wiretap transcripts, revealed that on nine or ten occasions Freeman accepted bets from Bergen. Although Freeman believed that some of these bets were for Bergen's personal account, it appears that Freeman

was being regularly used as a lay-off source for the Bergen bookmaking operation. The wiretap transcripts are particularly revealing. They showed that Freeman accepted bets from the Bergen operation that he knew were lay-off bets, and furthermore, that Freeman exchanged line information with the operation. It can also be reasonably inferred from the transcripts that Freeman was conducting a betting operation of his own. In short, Freeman was not just an occasional and unknowing recipient of lay-off bets from the Bergen operation, but was sufficiently involved in the operation to have committed a violation of §1955. See United States v. Baker, 589 F.2d 1008, 1013-14 (9th Cir. 1979).

Conclusion

The convictions are affirmed.

FILED
FEB 13 1980
RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. EDWARD KAIL, Defendant-Appellant.	No. 78-1633
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SEYMOUR BERGEN, Defendant-Appellant.	No. 78-1643
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. RUSSELL CALLAHAN, Defendant-Appellant.	No. 78-1772
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. CLARENCE ELDEN FREEMAN, Defendant-Appellant.	No. 78-1677 ORDER

Before: WALLACE and TANG, Circuit Judges, and BATTIN,* District Judge

The panel as constituted above has voted to deny each of the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

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* Honorable James F. Battin, United States District Judge for the District of Montana, sitting by designation.